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No. 83-618

# In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES H. SCHMIDT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

REX E. LEE
*Solicitor General*

WILLIAM F. BAXTER
*Assistant Attorney General*

JOHN J. POWERS, III
MARGARET G. HALPERN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether a four-month postponement of an evidentiary hearing on a complex motion challenging grand jury selection procedures was excludable in determining whether petitioner's trial began within the time limit fixed by the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*

2. Whether the procedures employed in selecting the grand jury that indicted petitioner comported with the Jury Selection and Service Act of 1968, 28 U.S.C. (& Supp. V) 1861 *et seq.*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 711 F.2d 595. The district court's order denying petitioner's motion to dismiss the indictment resting on the Speedy Trial Act (Pet. App. C1-C15) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 22, 1983. A petition for rehearing was denied on September 9, 1983. The petition for a writ of certiorari was filed on October 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of making false statements before the grand

jury, in violation of 18 U.S.C. 1623. Petitioner was sentenced to a three-year term of imprisonment and fined $10,000.

1. On November 20, 1981, a federal grand jury in the Western District of Texas indicted petitioner on two counts of making false declarations before a grand jury in violation of 18 U.S.C. 1623. The indictment charged that, during a grand jury investigation of bidrigging on government contracts, petitioner had falsely testified that neither he nor anyone in his construction and paving company had been asked to let another company win a bid through collusion (Count I), and that he had falsely stated that neither he nor his associates had asked other contractors to allow them to win a bid (Count II) (C.A. Record Excerpts 3-5). Petitioner was arraigned on December 9, 1981 (Pet. App. A10).

Prior to trial, petitioner filed numerous pretrial motions including, on March 15, 1982, a motion to dismiss the indictment alleging that the procedure employed in selecting the grand jury that had indicted him violated the local juror selection plan and was in substantial violation of the Jury Selection and Service Act of 1968, 28 U.S.C. (& Supp. V) 1861 *et seq.* (see Pet. App. C2-C4). Under the then-applicable provisions of the jury selection plan for the Western District of Texas, a grand jury could be drawn from the separate lists of qualified jurors maintained for two or more of the divisions of the court "on a substantially proportionate basis" (Pet. App. A7). The grand jury that had indicted petitioner was drawn at random from a pool of 60 jurors — 30 each from the juror wheels of the Waco and Austin Divisions of the court. Petitioner complained in his motion that because registered voters in the Austin Division are more numerous than those in the Waco Division, the pool was improperly constituted.

The district court initially scheduled an evidentiary hearing on this and other motions on May 10, 1982, but later postponed the hearing until September 24, 1982. Shortly before the September 24 hearing date, petitioner filed a motion to dismiss the indictment alleging that his trial had not commenced within the period provided by the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*

At the conclusion of the September 24 evidentiary hearing, the district court found that the grand jury selection procedures did not violate the local jury selection plan or the Jury Selection and Service Act (Pet. App. A9, C4; C.A. Record Excerpts 12-16). Subsequently, the district court denied the Speedy Trial Act motion. The court concluded that the period of time between the filing of petitioner's motion attacking the composition of the grand jury and the filing of his speedy trial motion was excludable time under the Speedy Trial Act, 18 U.S.C. 3161(h)(1)(F), because the delay resulted from the pendency of the former motion. In addition, invoking 18 U.S.C. 3161(h)(8), the district court found that postponement of the evidentiary hearing date from May 10, 1982, served the ends of justice and that the considerations justifying the continuance "outweigh[ed] the best interests of the public and the Defendant in a speedy trial" (Pet. App. C10).

The government's evidence at trial, the sufficiency of which petitioner does not challenge in this Court, established that, contrary to his grand jury testimony, petitioner had agreed on numerous occasions to submit intentionally high bids to enable other contractors to win jobs.[1] Moreover, following his grand jury testimony, petitioner told

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[1]Three of petitioner's co-conspirators testified that they had asked him or his superior to submit rigged bids, had received petitioner's agreement to submit a complementary bid, and had informed petitioner as to how they would bid (see, *e.g.*, 9 R. 278-290, 292-309).

another individual who had just received a grand jury subpoena that he had denied any knowledge of bidrigging during his grand jury testimony; petitioner suggested that the other witness do likewise. 10 R. 521-522. Indeed, petitioner later told the same witness that everyone was "just going to continue to deny" any knowledge of bidrigging and that "the lawyers can tear up" witnesses that had admitted involvement in bidrigging. GX 28, 29, 37. On the basis of this evidence, the jury returned a verdict of guilty on Count I of the indictment.[2]

2. The court of appeals affirmed petitioner's conviction. The court found "little merit" to petitioner's attack on the grand jury selection procedures (Pet. App. A7). The court observed that the Jury Selection and Service Act provides for dismissal of an indictment only where there has been a substantial failure to comply with the Act (Pet. App. A8). See 28 U.S.C. 1867(a). The court also noted that petitioner had not contended that a provision of the Act had been violated, but alleged only a violation of the local jury selection plan (Pet. App. A8). The court of appeals held that even if the selection method employed here violated the local plan, it did not rise to the level of a substantial violation of the Act because there was "no doubt that the random selection of jurors which the Act seeks to enforce was not violated in this case" (*ibid.*).

The court of appeals expressed doubt, moreover, that the local plan had in fact been violated in this case, noting that the plan required only substantial proportionality, not exact proportionality, of representation of different divisions (Pet. App. A9). The court also noted two ironies in connection with petitioner's motion attacking the grand

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[2]The jury was unable to reach an unanimous verdict on Count II. The district court granted petitioner's motion for a mistrial with respect to that count. 13 R. 992.

jury's composition. First, by the time that motion had been filed, the local jury selection plan had been amended to abolish multidivision grand juries and to permit a grand jury drawn from one division of the district to consider matters that would be triable in an adjacent division. Thus, had his indictment been dismissed, petitioner could lawfully have been reindicted by a grand jury drawn entirely from the division he contends was overrepresented here. Second, the court of appeals observed that, as it happened, the grand jury actually drawn from the challenged pool that had indicted Schmidt was composed of approximately the "correct" proportion of persons from the two divisions. Pet. App. A9.

The court of appeals also upheld denial of petitioner's Speedy Trial Act motion (Pet. App. A9-A12). The determinative issue, the court recognized (Pet. App. A10), was whether the 128 days between the date initially set for the evidentiary hearing on petitioner's grand jury motion and the date on which his Speedy Trial Act motion was filed was excludable in determining whether petitioner's trial began within the period allowed by the Act.[3] The court noted that Section 3161(h)(1)(F) of the Act excludes from speedy trial reckoning any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion" (Pet. App. A11). Relying upon its decision in *United States* v. *Horton*, 705 F.2d 1414 (5th Cir. 1983), cert. denied, No. 83-5259 (Nov. 28, 1983), the court rejected petitioner's contention that any delay longer than 30 days in disposing of a motion requiring a hearing is not excludable under Section 3161(h)(1)(F).

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[3]Filing of the Speedy Trial Act motion, prior to the date on which the grand jury motion ultimately was heard (see page 3, *supra*), halted running of the speedy trial "clock". 18 U.S.C. 3161 (h)(1)(F).

In *Horton*, 705 F.2d at 1416, the court had held that unless the delay entailed is egregious — as when a hearing is delayed without cause in the face of repeated requests for a hearing date or where the hearing delay reflects an intent to evade the requirements of the Speedy Trial Act — the entire period from the filing of a pretrial motion requiring a hearing until conclusion of the hearing is excludable under Section 3161(h)(1)(F). The court of appeals found no egregious delay in this case, observing that petitioner had not sought an earlier hearing, and found no evidence of an intent to evade the requirements of the Speedy Trial Act (Pet. App. A11-A12). Rather, the court of appeals concluded, the delay was attributable to the nature of the issues presented by the pending motion (*id.* at A12):

> Faced with what the [district] court perceived to be a complex and potentially far-reaching decision, the court postponed the original hearing to develop more fully the substance of the claim presented to it.

## ARGUMENT

1. Petitioner contends (Pet. 7-10) that the time that elapsed following postponement of the hearing upon his motion to dismiss the indictment originally scheduled for May 10, 1982, is not excludable from speedy trial computations. Alternatively, petitioner contends (Pet. 11-13) that the decision below conflicts with the Second Circuit's decision in *United States* v. *Cobb*, 697 F.2d 38 (1982), which imposes a reasonableness limitation upon the Section 3161(h)(1)(F) exclusion. As we explained in our brief in opposition in *Horton*, in which the Court has just recently declined to review a claim indistinguishable from the present one (see page 5, *supra*), these contentions are incorrect. A like disposition of petitioner's claim is appropriate.

a. Petitioner observes that the Speedy Trial Act was intended by Congress to "put teeth into the speedy trial guarantee" of the Sixth Amendment (Pet. 9, quoting *United States* v. *Mehrmanesh*, 652 F.2d 766, 769 (9th Cir. 1980)). But while Congress wanted to establish time limits to govern the prosecution of criminal cases, it also wanted to avoid "assembly-line justice" that sacrificed due process for the sake of dispatch. H.R. Rep. 93-1508, 93d Cong., 2d Sess. 15 (1974). The Act accordingly lists numerous categories of "delay" that must be excluded in determining whether a defendant's trial began within the time permitted by the Act. 18 U.S.C. 3161(h).

Among the automatic exclusions is 18 U.S.C. 3161(h)(1)(F) which provides for exclusion of:

> delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion * * *.

The plain language of the statute indicates that the exclusion begins when a pretrial motion is filed and ends when the motion is heard. *United States* v. *Stafford*, 697 F.2d 1368, 1373 (11th Cir. 1983). On its face, the language, "or other prompt disposition of [] such motion," which petitioner invokes to limit the exclusion (Pet. 8), does not govern the length of the exclusion where the motion is decided following a hearing. Instead, as the Senate Report on the 1979 Amendments to the Act explains, that language defines the ending date of the exclusion for motions that are decided on the papers without the benefit of a hearing (S. Rep. 96-212, 96th Cong., 1st Sess. 34 (1979)):

> Finally, the section provides exclusion of time from filing to the conclusion of hearings on or "other prompt disposition" of any motion. This later

> language is intended to provide a point at which time will cease to be excluded, where motions are decided on the papers filed without hearing.

Accord, Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* 33 (rev. 1979, with amendments Aug. 1981) [hereinafter cited as *Judicial Conference Guidelines*].[4]

Congress was well aware that, if abused, Section 3161(h)(1)(F) "could become a loophole which could undermine the whole Act." S. Rep. 96-212, *supra*, at 34. But rather than limiting the excludable time available for motions subject to hearing (as it did with respect to motions to be decided on the papers), Congress chose to admonish the courts to develop "basic standards for prompt consideration of pretrial motions." *Ibid.* Toward this end Congress encouraged use of circuit guidelines authorized under Section 3166(f); guidelines were to include "uniform standards for motion practice." *Ibid.*[5]

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[4]Petitioner's reliance (Pet. 10) upon the 30-day "under advisement" exclusion established by Section 3161(h)(1)(J) is unavailing. A motion that requires a hearing such as petitioner's motion to dismiss the indictment — upon which petitioner sought and was granted an evidentiary hearing — plainly is not under advisement prior to the time the hearing is held. Petitioner's suggestion (Pet. 10 n.2) that the district court must have studied the issues during the interval prior to the hearing is irrelevant. It is perfectly clear that the district court did exactly that (see Pet. App. C9-C10); yet the motion was not taken under advisement until the court had before it all of the pleadings and evidence it needed to render its decision. See *United States* v. *Bufalino*, 683 F.2d 639, 644 (2d Cir. 1982), cert. denied, No. 82-596 (Jan. 10, 1983) (quoting *Judicial Conference Guidelines* 42).

[5]Thus, the statement in the Senate Report emphasized by petitioner (Pet. 9) indicating that "the Committee [does not] intend that additional time be made eligible for exclusion by postponing the hearing date * * * beyond what is reasonably necessary" (S. Rep. 96-212, *supra*, at 34) does not reflect a determination that time prior to a hearing should be

b. Petitioners contend that certiorari should be granted here to resolve an apparent conflict between the Fifth Circuit's decisions in *Horton* and in this case and the Second Circuit's decision in *United States* v. *Cobb*, 697 F.2d 38, 43-46 (1982), which limits the Section 3161(h)(1)(F) exclusion for pendency of a pretrial motion to the time reasonably necessary for processing the motion, even in cases where the motion is to be heard. See also *United States* v. *Novak*, 715 F.2d 810, 819-820 (3d Cir. 1983), petitions for cert. pending *sub nom. Ware* v. *United States*, No. 83-5560, *McGuire* v. *United States*, No. 83-5613, and *Arabia* v. *United States*, No. 83-5650;[6] compare *United States* v. *Stafford, supra.*[7] But the court below did not adopt an absolute rule excluding all time elapsed prior to a hearing date. Rather, as in *Horton*, the court indicated that some portion of the pendency period might be disregarded in circumstances where delay was "egregious" (Pet. App. A11-A12; 705 F.2d at 1416). Accordingly, no clear conflict of

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excludable only if reasonably necessary, but instead Congress's determination that promptness in hearing practice itself should be assured through circuit guidelines. Otherwise, this statement would be inconsistent with the statements immediately preceding it, which we have quoted in the text, that such regulation of motion practice was essential to prevent Section 3161(h)(1)(F) from becoming a loophole in the Act. In any event, denial of the speedy trial motion in this case is entirely consistent with a standard of "reasonable necessity." See page 10, *infra*.

[6]In *Novak*, the Third Circuit adopted the approach of the Second Circuit's *Cobb* decision.

[7]In *Stafford*, the Eleventh Circuit stated that Section 3161(h)(1)(F) does not condition exclusion upon a determination that a hearing was promptly held (697 F.2d at 1373). It did not address the question whether pretrial motion-related delay is non-excludable where it is shown that a hearing was delayed with intent to evade the sanctions of the Act.

authority exists between the Fifth Circuit and decisions of any other court of appeals.[8]

Moreover, there is no reason to believe that petitioner would have prevailed upon his claim in either the Second or Third Circuits, for the district court's findings clearly disclose that the postponement of the hearing on petitioner's motion was reasonably necessary to the proper determination of the issues. The court noted that numerous defense motions were pending contemporaneously during the interval in question (Pet. App. C7). In explaining the postponement, the district court stressed the voluminous pleadings and exhibits it was required to consider in connection with petitioner's motion, and most importantly, the fact that petitioner's motion "evoked a flurry of corresponding assaults on this District's grand jury selection process in comparable Motions to Dismiss filed by 14 other Defendants indicted by the same grand jury" in related cases assigned to the same district judge (*ibid.*). Because defense counsel sought an evidentiary hearing in this case and the comparable cases, and because the court determined that the ends of justice would best be served by scheduling a single hearing on all 15 motions,[9] the court reasonably determined that additional time was necessary for it to prepare for the omnibus hearing (Pet. App. C8).[10]

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[8]Petitioner's reliance (Pet. 12) upon *United States* v. *Raineri*, 670 F.2d 702, 708 (7th Cir. 1982), is entirely misplaced. The Seventh Circuit there addressed the situation in which pretrial motions are to be decided on the papers (see pages 7-8, *supra*). This is apparent because the court treated the motion as "under advisement" for Speedy Trial Act purposes beginning on the date the last pleading was filed. See page 8 note 4, *supra*.

[9]Petitioner's counsel presented evidence and argued for all 15 defendants at the evidentiary hearing (Pet. App. C8).

[10]Petitioner now claims for the first time that he "was * * * notified by the court's docket clerk that the settings were being rescheduled due to other matters which needed to be taken up by the court" (Pet. 3). We have found nothing in the record to support this assertion unless it is taken to refer to the related motions.

Indeed in *Cobb* the Second Circuit recognized that extensive time periods may be "reasonably necessary" for disposition of motions where they are numerous or complicated or where defendants' conduct contributes to the delay (697 F.2d at 45). Rather than dismiss the indictment in *Cobb*, the Second Circuit remanded to allow the district court to determine the reasonableness of the prehearing delay. Similarly, the Third Circuit emphasized in *Novak*, that the standard of "reasonable necess[it]y" it had adopted was a flexible one designed to accommodate the broad variety of circumstances that might warrant exclusion of extended periods of time under Section 3161(h)(1)(F). 715 F.2d at 820. And in *Novak* itself the Third Circuit concluded that the "number and complexity" of the pending motions warranted the hearing preparation delay (*id.* at 820-821).

Thus, this case provides no occasion for this Court to address whether prehearing delay excludable under Section 3161(h)(1)(F) is limited to "reasonably necessary" time. And the question whether a particular period of "delay" is reasonable is plainly so fact-bound as to be inappropriate for review by this Court.[11]

2. Petitioner also contends (Pet. 14-21) that a non-random method was used to select the grand jury that indicted him and that the court below followed an erroneous interpretation of the Jury Selection and Service Act in concluding that there was no substantial violation of that Act. This contention is unfounded.

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[11]We note that the court of appeals did not consider the district court's alternative holding that the postponement was necessary to serve the ends of justice (see page 3, *supra*). This alternative rationale is independently sufficient to sustain the judgment of the court of appeals.

The 23 grand jurors who indicted Schmidt were chosen at random from a panel of 60 qualified jurors — 30 each from the qualified juror wheels of the Austin and Waco Divisions of the Western District of Texas. The presence in the pool of 30 rather than 39 potential jurors from the Austin Division did not violate either the local plan or the Act. As the court of appeals noted, the local plan did not require the two divisions to be represented in the jury pool on an exactly proportionate basis. Rather, substantial proportionality was all that was required under the former local plan. As both courts below correctly held, the substantial proportionality requirement was satisfied by the use of an equal number of jurors from both divisions. Pet. App. A9.

But even assuming that the selection method violated the local plan, there was no basis here for dismissal of the indictment. Dismissal of an indictment is required only where there has been a substantial violation of the Act. 28 U.S.C. 1867(a). Courts thus must apply the harmless error doctrine even as to direct violations of the Act. *United States* v. *Bearden*, 659 F.2d 590, 600 (5th Cir. 1981), cert. denied, 456 U.S. 936 (1982). Petitioner has cited no authority establishing that technical violations of the Act that do not interfere with the random selection of jurors or result in the disqualification of jurors on the basis of non-objective criteria are to be treated as substantial violations of the Act. Rather petitioner's contention appears to be that the lower courts have universally misinterpreted the Jury Selection and Service Act (see Pet. 14).

In this case, the court of appeals concluded that the alleged violation of the former local plan had not interfered with the random selection of grand jurors and had not otherwise frustrated the objectives of the Act. It is difficult to see how any other conclusion could be reached. The Act prescribes that jurors be chosen "at random from a fair

cross section of the community in the district or division wherein the court convenes." 28 U.S.C. 1861. Petitioner has not suggested that the Act required either the multidivisional grand jury system formerly employed in the Western District of Texas, or the single division approach now employed (see page 5, *supra*). Thus, it would be wholly arbitrary to condemn the procedure employed in this case because of the particular ratio of grand jurors chosen from the Waco and Austin Divisions.[12] And there is no suggestion here that the selection process by which the grand jury was chosen from among the panel of 60 qualified individuals was other than completely random. Thus, there was no substantial violation of the Act in this case.[13]

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[12]For this reason, petitioner's contention (Pet. 17 n.5) that the selection procedure used here "potentially discriminated against Hispanics" is insubstantial. In any event, Spanish-surnamed persons comprised 9% of the eligible voters in Austin, and 4% of the eligible voters in Waco. 5 R. 90. The impact of the jury selection plan violation alleged here (see page 2, *supra*) upon Hispanic participation on the grand jury is accordingly negligible. Simple computations reveal that the expected average incidence of Spanish surnamed grand jurors if the grand jury had been selected in the manner petitioner favors would be 1.69 per grand jury, whereas under the procedures used here, the expected incidence of Hispanic grand jurors would be 1.5.

[13]Petitioner contends that there is a conflict within the Fifth Circuit concerning the proper interpretation of the Act (Pet. 16-17). Conflicts within the Fifth Circuit, however, are for that court to resolve and do not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, *United States* v. *Kennedy*, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865 (1977), which is said to be inconsistent with *Bearden*, and the decision here, may readily be reconciled with the subsequent decisions of that court. Indeed, in *Bearden* the Fifth Circuit explicitly distinguished *Kennedy*. 659 F. 2d at 603. *Kennedy*, the court explained, involved a juror selection practice that clearly resulted in the nonrandom selection of jurors. *Ibid.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

WILLIAM F. BAXTER
*Assistant Attorney General*

JOHN J. POWERS, III
MARGARET G. HALPERN
*Attorneys*

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